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No. 82-185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner,
v.
BOSTON CHAPTER, NAACP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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December 16, 1982

QUESTION PRESENTED

Whether a federal court can replace a racially neutral, bona fide seniority system with a court order that mandates preferential treatment for minority workers based solely on their race even though they are not victims of discrimination?

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MOTION OF THE WASHINGTON LEGAL FOUNDATION TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves pursuant to Supreme Court Rule 42 to file the annexed brief *amicus curiae* in the above-captioned proceeding. Petitioner consents to the filing of the brief. Respondents failed to respond to WLF's request for consent.

The Washington Legal Foundation is a national non-profit public interest law center that engages in litiga-

tion and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases relating to government regulations and constitutional law which involve the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by this Court in employment discrimination cases such as *General Building Contractors Association, Inc. v. Pennsylvania*, —— U.S. ——, 73 L. Ed.2d 835 (1982); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980); and *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to reverse the decision of the First Circuit Court of Appeals in *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965 (1st Cir. 1982). The First Circuit's ruling suspends the application of a bona fide seniority system established by State law and immunized from attack by § 703(h) of the Civil Rights Act of 1964. The Court mandates preferential treatment for certain workers, based solely on their race, even though they have not been identified as victims of past discriminatory practices. In doing so, the lower court effectively dons a legislative mantle by substituting its judgment for that of Congress and the State legislature; an act which is neither judicial in function nor in accord with the prior decisions of this Court or other U.S. Courts of Appeals. Hence, WLF is seeking to protect the broader interests in this case—the right of *any* individual, black, white or otherwise, to be free from discrimination based on race.

The Washington Legal Foundation can bring to this case a broader perspective not presently represented which may assist this Court in obtaining full consideration of the public interest issues. WLF believes that resolution of the case at bar will have an impact which far exceeds its case-unique aspects. The instant decision will ultimately affect the seniority rights of millions of American workers and the relationships of those workers with labor unions, employers, and the Federal Government. Fundamental concepts of equality mandated by statute and the Constitution are at stake here.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The interest of the Washington Legal Foundation in this case is set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

The Washington Legal Foundation adopts the recitation of facts in the Petition for Writ of Certiorari at pages 3-8 in the interests of judicial economy. However, the facts which are particularly material to the issues at bar are summarized in order to frame *amicus'* presentation.

The decision of the United States Court of Appeals for the First Circuit upholds a District Court order which modified a 1974 consent decree in an employment discrimination case against the fire and police departments of Boston and other Massachusetts towns. The suit, filed under 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964, focused on hiring practices and the 1974 decree ordered remedial action designed to increase the percentage of minorities in the fire and police departments.

The Boston Fire and Police Departments established priority certification groups which gave top priority to hiring any minority identified as a victim of past discrimination. By 1977, all victims of past discrimination who sought employment had been hired. However, a 1981 fiscal crisis engendered by a tax reduction referendum necessitated a systematic program of layoffs in the fire department. Firefighters and policemen were to be laid off pursuant to the "last-hired, first-fired" provisions of Massachusetts law. Mass. Gen. Laws, Ch. 31, § 339.

The District Court, however, found that the application of the seniority system would dilute the percentage of minorities employed by the Boston Fire and Police departments. Hence, the court issued an injunction prohibiting layoffs by reverse order of seniority. (No minority firefighter who was an identified victim of past discrimination would have been laid off under the last hired, first fired system). In short, the Court below mandated that layoffs be implemented according to a wooden formula imposing racial quotas on the process.[1]

The First Circuit approached the case as one involving "two competing rights, earned seniority versus . . . racially balanced police and fire departments," *Beecher*, 679 F.2d

[1] Subsequent to the court order, the Massachusetts legislature provided funds for rehiring laid-off firefighters. The lower court again mandated that the application of the seniority system be suspended for purposes of the recall.

at 977, and upheld the suspension of the seniority provisions of the Massachusetts Civil Service Statute. In the Fire Department alone, over 100 non-minority firefighters who would otherwise have retained their jobs were discharged as a result of the lower court's ruling.

SUMMARY OF ARGUMENT

The First Circuit Court of Appeals erroneously ruled that a federal court can suppress the operation of a racially neutral, bona fide seniority system on the grounds that it has a disproportionate impact on minorities. The court's attempt to characterize its decision as involving only the power of a court to modify an existing equitable remedy fails. Semantics cannot disguise that the court has engaged in unauthorized social engineering by superimposing a racial quota on the layoffs of otherwise equal minority and non-minority workers without even demonstrating that the minority workers were victims of discriminatory practices. Since its ruling is at odds with the language and legislative history of sections 703(h) and (j) of the Civil Rights Act of 1964 and the prior decisions of this Court and other U.S. Courts of Appeals, its decision must be reversed.

The ruling below must also be reversed because it sanctions or authorizes reverse discrimination in violation of the Equal Protection Clause of the U.S. Constitution. The First Circuit mandates a system of racial preference for minority groups at the expense of other innocent individuals absent any findings that the groups preferred suffered anything more than general societal discrimination. Hence, the lower court's decision is not the limited and properly tailored remedy necessary to cure the effects of prior discrimination which this Court requires in order for a racial preference classification to pass constitutional muster.

Moreover, the decision below is contrary to the public interest. By replacing individual rights and opportunities with a system of statistical racial quotas, the lower

court engages in social engineering and violates basic concepts of our democratic society, unnecessarily trammels the interests of nonminority employees, and undermines national labor policy. Hence, both legal and policy reasons support reversing the decision of the First Circuit Court of Appeals.

ARGUMENT

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS CONTRARY TO THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTIONS 703(h) AND (j) OF THE CIVIL RIGHTS ACT OF 1964 AND THE PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The decision of the First Circuit Court of Appeals fails to recognize the special protection Congress afforded bona fide seniority systems in section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), or the prohibition against preferential treatment in order to achieve racial balance it provided in section 703(j). 42 U.S.C. § 2000e-2(j). Its conclusion that the operation of the last hired, first fired provisions of a valid seniority system established by State law must give way to a quota which specifies the percentage of minority employees who must remain on the job is at odds with the plain language and legislative history of sections 703(h) and (j) and the prior decisions of this Court and other U.S. Courts of Appeals. Therefore, the decision of the court below must be reversed.

A. The Plain Language and Legislative History of Section 703(h) of the Civil Rights Act Indicate a Congressional Intent, Recognized by This and Other Courts to Immunize Bona Fide Seniority Systems From Attack Under the Civil Rights Laws.

The plain language and legislative history of section 703(h) of the Civil Rights Act of 1964 demonstrate that Congress intended to foreclose attacks under the civil rights laws on bona fide seniority systems. Section 703(h) provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(h). Thus, the language of section 703(h) indicates that the operation of a seniority system is not subject to attack unless it is motivated by an intent to discriminate. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

An examination of the legislative history of section 703(h) buttresses the conclusion that seniority systems are exempt from challenges under the civil rights laws. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *American Tobacco Co. v. Patterson*, 50 U.S.L.W. 4364 (April 15, 1982); *Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); *Waters v. Wisconsin Steel Workers of International Harvester*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *see generally*, Vaas, *Title VII: Legislative History* 7 B.C. Ind. & Com. L. Rev. 431, 445 (1966). It is clear from that history that Congress specifically addressed Title VII's effect on seniority systems and struck a balance between the application of Title VII and the operation of racially neutral seniority systems which is now undermined by the decision of the First Circuit.

Charges were leveled during the adoption of Title VII that it would destroy existing seniority rights. *See International Brotherhood of Teamsters v. United States*, 431

U.S. 324, 350, n.33 (1977). As part of the effort to clarify the intent and effect of the bill (an effort necessary to insure its passage), an Interpretive Memorandum by Senators Clark and Case, floor managers in the Senate for Title VII, was placed in the Congressional Record. It stated that:

> *Title VII would have no effect on established seniority rights* . . . for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 *Cong. Rec.* 7213 (April 8, 1964) (emphasis added); *see also* 110 *Cong. Rec.* 7217 (April 8, 1964) (remarks of Senator Clark). Similarly, a Department of Justice memorandum interpreted Title VII as not affecting seniority systems:

> *Title VII would have no effect on seniority rights* . . . If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first . . . *assuming that seniority were built up over a period of time these rights would not be set aside by the taking effect of Title VII.* Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 *Cong. Rec.* 7207 (April 8, 1964) (emphasis added). These statements, which this Court has termed "authoritative," *Teamsters*, *supra* at 352, are representative of other statements defining the purpose of Congress in enacting section 703(h). See *id.* at 350-52; *American Tobacco Co.*, *supra* at 4366-67. *See generally* Capaldi,

Twisting the Law, 12 POLICY REVIEW 39 (1980). Given this clear expression of Congressional intent, it is not surprising that this Court and most of the U.S. Courts of Appeals which have considered the question have upheld the Congressional mandate to not interfere with the operation of seniority systems.

1. ***This Court has recognized that bona fide seniority systems such as the one at bar are not subject to judicial interference absent a discriminatory purpose.***

This Court has consistently recognized that "the unmistakable purpose of section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *International Brotherhood of Teamsters*, 431 U.S. 324, 352 (1977). *See also, United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *American Tobacco Co. v. Patterson*, 50 U.S.L.W. 4364 (April 6, 1982); *Pullman-Standard, A Division of Pullman, Inc. v. Swint*, 50 U.S.L.W. 4425 (April 27, 1982). The Court has given effect to this purpose in a variety of contexts which are similar in principle to the one at bar.

For example, in *Teamsters, supra*, an employer maintained parallel seniority systems for different job classifications under the terms of a collective bargaining agreement. Transfer by an employee from one job to another resulted in a forfeiture of seniority for the new position. While this Court found that the seniority system distributed benefits in a manner that had a disproportionate impact on minorities, it concluded nevertheless that "both the literal terms of section 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them even when an employer had initially discriminated in hiring." 421 U.S. at 350.

Accordingly, a seniority system violates Title VII only if it is not "bona fide" or its impact results from an "intention to discriminate." *Id.*

The *Teamsters* Court concluded that the seniority system under attack there was "entirely bona fide." 431 U.S. at 355. The Court reasoned that it applied equally to all races and ethnic groups and did not have its genesis in racial discrimination. *Id.* Hence, judicial interference with the operation of the system was unwarranted.

This Court similarly concluded in other cases that the operation of a seniority system with some discriminatory consequences is not unlawful absent a discriminatory intent. *Pullman-Standard, supra,* involved a challenge to a seniority system which measured seniority by length of continuous service in a particular department; employees transferring to new departments forfeited their seniority. The District Court held a trial to determine whether the system was adopted for racially discriminatory purposes and concluded that it was not. The Fifth Circuit Court of Appeals reversed the trial court's determination. In ruling that the Court of Appeals erred in reviewing the District Court's judgment, this Court held that under section 703(h) "a showing of disparate impact is insufficient to invalidate a seniority system even though the result may be to perpetuate pre-Act discrimination." 50 U.S.L.W. at 4426. *See also Trans World Airlines,* 432 U.S. at 82 ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."); *American Tobacco Co.,* 50 U.S.L.W. at 4365 ("the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved.")

Significantly, no allegations or findings of an intent to discriminate have been made in the case at bar. Nor have any victims of past discriminatory practices been identi-

fied who have been denied their rightful seniority.[2] *Cf. Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

While the First Circuit attempts to veil its action in a semantic sleight-of-hand by stating that "the basic issue at stake here [is] the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs," *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 974 (1st Cir. 1982), *amicus* is at a loss to understand how the action of the courts below can be distinguished from the situations specifically identified by Congress as protected by section 703(h). Nor can WLF understand how the lower courts' action can be insulated from this Court's rulings that disproportionate impact alone is not sufficient reason to undermine a seniority system. It is abundantly clear that this case involves only the validity of the seniority system mandated by the Massachusetts Civil Service Statute under Title VII and a federal court's attempt to eviscerate it and the intent of Congress embodied in section 703(h). Both the District Court and Court of Appeals ignored the *bona fides* of the seniority system under attack. Instead, they focused solely upon the disparate impact of the projected layoffs on minority employees and proceeded to substitute their personal notion of the social good for the "careful balance" Congress struck when it passed section 703(h). *American Tobacco Co., supra* at 4368. That their judgment is contrary to the language and legislative history of section 703(h) and the principles previously anounced by this Court is sufficient reason to reverse. A brief examination of other pertinent authority adds further support for a reversal.

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[2] Indeed, it could not involve identifiable victims of past discrimination since none of the minorities who were laid off or who would have been laid off except for the District Court order were victims of the fire department's prior discriminatory *hiring* practices.

2. *Decisions of other U.S. Courts of Appeals, which recognize the difference between remedial and preferential treatment, also support a reversal of the First Circuit's ruling.*

The decisions of other U.S. Courts of Appeals, which are indistinguishable in fact and principle from the case at bar, support a reversal of the ruling below. *See Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Central Power & Light Co. v. Local Union 327, I.B.E.W.*, 508 F.2d 687 (3rd Cir. 1975) *cert. denied*, 425 U.S. 998 (1976); *Watkins v. Steel Workers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975); *Chance v. Board of Examiners and Board of Education of the City of New York*, 534 F.2d 993 (1976) *cert. denied*, 431 U.S. 965 (1977). *Contra, Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981). For instance, *Watkins, supra*, considered whether the use of employment seniority to determine the order of layoff and recall of employees violated either Title VII or 42 U.S.C. § 1981 given that the employer discriminated in hiring at an earlier time. Like the seniority system mandated by Massachusetts law, the system in *Watkins* measured seniority by total time of employment. The Fifth Circuit held that:

> regardless of an earlier history of employment discrimination, when present hiring practices are nondiscriminatory . . . an employer's use of a long established seniority system for determining who will be laid off, and who will be rehired, adopted without intent to discriminate is not a violation of Title VII or § 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination.

516 F.2d at 44-45.

The process by which the Fifth Circuit reached its conclusion is instructive here. The Court noted that "[t]here is no contention . . . that the seniority system under attack was the result of an intention to discriminate." *Watkins*, 516 F.2d at 47. Moreover, an examination of the facts indicated that none of the plaintiffs had been subjected to "individual discrimination at the hands of the Company." *Id.* at 46. According to the court, "[a]ge, not race is the principal reason the plaintiffs . . . did not have sufficient seniority to withstand layoff. All but one were under the age of legal employment when the Company commenced equal hiring." *Id.* In light of these circumstances, the Fifth Circuit made a critical legal distinction between remedial and preferential treatment which eluded the First Circuit:

> *To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. . . . The result which plaintiffs seek, therefore is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703 (j).* 42 U.S.C. § 2000e-2(j).

Id. (emphasis added).

The Second Circuit reached the identical conclusion in *Chance, supra.* As in *Watkins* and the instant case, the *Chance* court examined the operation of a facially neutral last hired, first fired provision of a seniority system which had a disproportionate impact on minorities. The District Court there, like the District Court and First Circuit here, fashioned "relief" which was designed to "insure that there would continue to be a specified quota of [minorities] employed" in the work force. 534 F.2d at 998. Nevertheless, the Second Circuit reversed the trial court's decision since the "relief" was not directed to victims of discrimination. *See also Jersey Central, supra.*; *Waters, supra.*

The sound reasoning of the Fifth, Second, Third, and Seventh Circuits underscores the errors in the First Circuit's analysis. There was, for instance, no contention or proof below that any minority firefighter who would have been laid off absent judicial intervention was the subject of individual discrimination by the Fire Department. In fact, the record indicates that the minority firefighters hired from 1978 through 1980 enjoyed the benefit of the Department's equal hiring practices and that *none* of the victims of prior discrimination would have been laid off. Thus, the layoffs, which should have been implemented on the basis of length of employment, proceeded instead solely on the basis of a color conscious quota; that is, the rulings below granted individual employees superseniority without any remedial purpose. There was no discrimination to be remedied as to the individuals favored in the court order and it seems obvious that a wrong which did not occur cannot be remedied.

The sole stated goal of the action below was to insure a certain percentage of minority firefighters; a goal which has nothing to do with insuring that the seniority system operates in a non-discriminatory manner. Achieving that goal clearly violates the purpose of section 703(h) and, as demonstrated below, the proscription of section 703(j) as well.

B. The First Circuit's Ruling Also Violates Section 703(j)'s Proscription Against Preferential Treatment to Correct Racial Imbalance in a Work Force.

The First Circuit's Ruling is inconsistent with the language, legislative history, and prior judicial interpretations of section 703(j) of Title VII. Section 703(j) flatly states that the Civil Rights Act shall not:

> be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of per-

> sons of any race employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community. . . .

42 U.S.C. § 2000e-2(j). Thus, the plain language of section 703(j) appears to prohibit the kind of quota mandated below.

The legislative history of the provision supports that conclusion. Like the legislative history of section 703(h), that of section 703(j) has been examined in depth elsewhere and will not be repeated in detail here. For example, in *United Steel Workers v. Weber*, 443 U.S. 193 (1979), *reh'g denied*, 444 U.S. 889 (1980), the plurality and dissenting opinions all examined the legislative history of section 703(j) and recognized that the provision resulted from Congressional concern that Title VII "would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to racial minorities. . . ." *Id.* at 205. *See also id.* at 217 (Burger, C.J., dissenting); *id. at* 227-28 (Rehnquist, J., dissenting). As the Court's opinion stated:

> The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue 'Federal Government interference . . . because of some Federal employee's ideas about racial balance or racial imbalance.'

Id. at 206-07 (citations and footnote omitted).

In light of the language and legislative history of Title VII, this Court has ruled that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and that "Title VII prohibits racial discrimination against the white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976). While this Court

has considered Title VII's outright prohibition against preference based on race, *see Weber*, *supra*, it has never interpreted it to *require* preference based on race absent identified victims of discrimination.

The decision below, no matter how the First Circuit attempts to characterize it, interprets Title VII as permitting a federal court to *require* preference based solely on race in order to achieve racial balance. The other Courts of Appeals which have considered the precise question now facing this Court have held that:

> All agree . . . that the nonremedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress.

Chance, 534 F.2d 998; *Watkins*, 516 F.2d at 46; *Jersey Central*, 508 F.2d at 709; *Waters*, 502 F.2d at 1319.

The First Circuit should have reached a similar conclusion in the case at bar. Instead, it chose to "rewrit[e] a crucial part of Title VII to reach a 'desirable' result," *Weber*, 443 U.S. at 219 (Burger, C.J., dissenting), and to act as "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness." *Id.* at 219-20, *quoting*, Cardozo, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Unfortunately, the lower court's ideal abuses the clear language of and underlying motivation for a Congressional enactment. As one commentator has noted, "[i]n order to go beyond race-consciousness, Congress felt that such a public policy had to be eliminated outright, not perpetuated in a slightly different guise and directed toward different victims." Hatch, *The Son of Separate But Equal: The Supreme Court and Affirmative Action*, in A BLUEPRINT FOR JUDICIAL REFORM 63 (P. McGuigan & R. Rader, ed. 1982) (hereafter "Hatch"). Since the First Circuit's decision perpetuates race-consciousness with new victims in violation of section 703(j), the ruling below must be reversed.

II. REQUIRING SENIOR EMPLOYEES TO STAND ASIDE AND FOREGO THEIR SENIORITY BENEFITS GUARANTEED BY LAW, SOLELY BECAUSE AN OTHERWISE EQUAL, LESS SENIOR EMPLOYEE IS BLACK OR HISPANIC, VIOLATES THE CONSTITUTION.

The decision of the First Circuit Court of Appeals, which requires senior firefighters to relinquish seniority benefits guaranteed them by law solely because otherwise equal, less senior employees are black or hispanic, violates the Equal Protection Clause of the United States Constitution. The lower court's opinion admits that:

> This case does not involve an award of constructive seniority to individuals who had been discriminated against; the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination.

Boston Chapter, NAACP v. Beecher, 679 F.2d at 975. After cursory references to this Court's decisions in *Mc Donald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), *University of California Regents v. Bakke*, 438 U.S. 265 (1978), *United Steelworkers of America v. Weber*, 443 U.S. 193, *reh'g denied*, 444 U.S. 889 (1980), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the First Circuit notes that none of these cases "involve public employment nor address directly . . . the conflict between a last hired, first fired seniority system and court orders seeking to maintain same semblance of racial balance. . . ." 679 F.2d at 976. The court blithely reasons that "[w]e do not think the issue can be resolved by simply following the Title VII cases and awarding constructive seniority to those minority members . . . that can show that they were discriminated against . . ." Rather, the court reasons that while certain individual white workers innocent of discrimination will lose their jobs, "whites *as a*

group reaped significant advantages in the past in hiring and promotions. . . . This is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments" which "the public interest requires." *Id.* at 977. Thus, the court concludes that "[w]hile the orders place a relatively greater share of the burdens of the layoffs upon non-minorities, this does not constitute 'reverse discrimination.'" *Id.* at 978.

The Washington Legal Foundation submits that the First Circuit's reasoning indeed constitutes reverse discrimination in violation of the principles previously announced by this Court. Justice Powell stated in *Bakke*, *supra*, that "[r]acial and ethnic distinctions of *any sort* are inherently suspect and thus call for the most exacting judicial examination." 438 U.S. at 291 (emphasis added). In conducting such examinations, this Court has refused to justify allegedly remedial action solely on generalized societal discrimination. As the *Bakke* court stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent individuals* in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.

438 U.S. at 307 (emphasis added). This finding of discrimination must be much more focused than a general finding of overall " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." *Id.*

Bakke, and later *Fullilove*, *supra*, thus establish a fundamental prerequisite to the imposition of a racial preference classification—a finding of actual prior discrimination. Moreover, the preference must be "a limited and properly tailored remedy to cure the effects of prior

discrimination" to pass Constitutional muster. *Fullilove*, 448 U.S. at 484. The *Fullilove* Court emphasized that the program approved there was very narrowly tailored so that only those minority businesses who had actually suffered from past discrimination would benefit from the quota imposed. In contrast, the quota imposed in the instant case is neither "limited," "properly tailored," based on findings of "prior discrimination," nor a "remedy." It is merely a reflection of what two lower federal courts personally believe will best serve their notions of the public interest. Even if their judgment was correct, they lack the authority to make such a decision. As the decisions stands, the quota imposed constitutes reverse discrimination in violation of the Equal Protection Clause.

III. THE LOWER COURT'S DECISION IS CONTRARY TO THE PUBLIC INTEREST.

Substantial policy reasons exist for striking down the First Circuit's decision in the case at bar. An objective examination of the court's opinion demonstrates that it has assiduously avoided the controlling principles of law in order to reach a decision which comports with its view of the social good. The court's attempt at social engineering constitutes a legislative decision which far exceeds its authority and expertise. The decision is nothing more than unwarranted judicial interference of the type which has undermined public confidence in the federal judiciary.

While the First Circuit's decision may be well-intended, it disserves the public interest. Its replacement of individual rights and opportunities with a system of group rights and statistical racial quotas is repugnant to the basic concepts of our democratic society. It destroys individual freedom and denigrates individuals by reducing them to and granting them preference on a single charac-

teristic of birth—skin color. Ironically, a majority of Americans, minority and non-minority, oppose the type of preferential treatment based on race mandated by the court below. *See, e.g.*, Sackett, *Ignoring the People*, 12 POLICY REVIEW 9, 17 (1980), *citing, Survey by the Gallup Organization*, Oct. 21-24, 1977. The reason, *amicus* submits, for public opposition is:

> that Affirmative Action has nothing to do with the transcendant cause of civil rights. Affirmative Action is not the logical and inevitable result of the civil rights efforts of the past three decades. It is exactly and precisely the contrary. It is a radical departure from the spirit and genius of the American Constitution (and I would be the first to admit that we have not always been faithful to that spirit and genius) because it denies that all are entitled to equal protection of the laws. Instead, *it says that what you get depends upon who you are, what your skin color or ethnic background is. It is a retreat to the medieval notion of government by status.*
>
> Affirmative Action is immoral (and is unconstitutional) for exactly the same reasons that discrimination is immoral (and is unconstitutional). It means that we are not treating people as individuals. It cannot be justified or regarded as some form of "reparation" for the wrongs of the past. The people who benefit from Affirmative Action are not the ones wronged and the people who must pay . . . are not the ones who committed the wrong.

Hatch, *supra* at 75 (emphasis added).

That the lower court mandates preferential treatment for minorities who were not victimized by discrimination is particularly egregious. It effectively creates superseniority for new employees; a "remedy" for a nonexistent wrong which "unnecessarily tramel[s] the interests of white employees," *Weber*, 443 U.S. at 208, in

an effort to redress past discrimination in its broadest and vaguest sense. Unfortunately, the effort is totally lacking in focus. The actual victims of past discrimination are not helped. At the same time, new, innocent victims suffer in order to grant preference to individuals who have not been wronged. The result, therefore, is not an equitable remedy, but discrimination in its most primitive and senseless form.

Finally, the impact of the First Circuit's decision on labor relations will also disserve the public interest. The court's statement that "[w]hile seniority was the normal way to decide who must go first, there is nothing magical about seniority . . . " flies in the face of national labor policy. This court has repeatedly recognized the strategic importance of seniority systems. In *American Tobacco Co. v. Patterson, supra*, the Court stated that:

> Seniority provisions are of "overriding importance" in collective bargaining. *Humphrey v. Moore*, 375 U.S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison, supra*, at 79. See also Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). The collective bargaining process "lies at the core of our national labor policy. . . ." *Trans World Airlines, Inc. v. Hardison, supra*, at 79.

50 U.S.L.W. at 4368. This Court's statements underscore that seniority systems, which promote job security and form an objective standard for promotions, layoffs and the like, should not be readily cast aside. The First Circuit's opinion, which suppresses a bona fide seniority system, will have a broad-ranging and immediate adverse impact on labor relations in this country if it is allowed to stand. Such a fundamental change in our labor policy is neither called for nor in our best interests.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that the ruling of the court below must be reversed.

Respectfully submitted,

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December 16, 1982

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

v.

BOSTON CHAPTER, NAACP, ET AL.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

v.

PEDRO CASTRO, ET AL.

NANCY B. BEECHER, ET AL., PETITIONERS

v.

BOSTON CHAPTER, NAACP, ET AL.


nited

QUESTION PRESENTED

The brief for the United States will address the following question:

Whether the district court exceeded its equitable authority by suspending the application of the "last hired first fired" requirement in a bona fide statutory seniority system to layoffs in the Boston Police and Fire Departments in order to maintain the percentage of minority employees in both departments who had been hired in response to a court order requiring affirmative action as a remedy for the City's prior discriminatory hiring practices.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-185

BOSTON FIREFIGHTERS UNION, LOCAL 718, PETITIONER

v.

BOSTON CHAPTER, NAACP, ET AL.

No. 82-246

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., PETITIONER

v.

PEDRO CASTRO, ET AL.

No. 82-259

NANCY B. BEECHER, ET AL., PETITIONERS

v.

BOSTON CHAPTER, NAACP, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. The Attorney General is responsible for the enforcement of Title VII in cases such as this one where the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issue presented in this case, viz., the propriety of a court order requiring that layoffs of city employees be made not on the basis of a preexisting system of seniority, but rather on a modified seniority system designed to assure that recently hired minority employees be retained, will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.

STATEMENT

The judgment of the court of appeals was entered in two consolidated cases, one involving the Boston Police Department and the other the City's Fire Department. The cases are summarized separately below.

1. *The Police Department Case*

a. This action was originally filed in 1970 by respondent Castro and other unsuccessful black and Hispanic applicants for appointment as Boston police officers. Plaintiffs alleged that the recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented by the City of Boston were racially discriminatory in violation of the Fourteenth Amendment and 42 U.S.C. 1981 and 1983.[1] See *Castro* v. *Beecher*, 334 F. Supp. 930, 934-935 (D. Mass. 1971).

[1] Before applicants for police (and fire) jobs in the City of Boston and other government bodies in Massachusetts can be considered for employment, they must pass a test devised and administered by the State Civil Service Commission. Mass. Ann. Laws ch. 31, § 15 (Michie/Law. Co-op. 1973). After passing the test, applicants must also meet age and medical requirements before they can be hired for employment by the City of Boston and other municipalities.

Following a bench trial, the district court ruled that the 1968-1970 Massachusetts Civil Service Police Entrance Examinations were not job related and discriminated against all applicants who "did not share the prevailing white culture."[2] 334 F. Supp. at 943. Although the court expressly found (*id.* at 944) that defendants had no intent to discriminate against minorities, it held that use of the examinations violated the Fourteenth Amendment and Sections 1981 and 1983. The court enjoined the Commission from making further certifications based on the discriminatory examinations (334 F. Supp. at 952), but denied plaintiffs' request for an order requiring hiring priority for blacks and Hispanics (*id.* at 945, 949-950).

b. The court of appeals affirmed on the liability issues,[3] but remanded the case for the district court to enter a

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[2] The district court found that in 1970 blacks represented 16.3% of Boston's population, but only 3.6% of its police force. 334 F. Supp. at 935.

[3] Acknowledging that defendants had not acted with discriminatory intent (*Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972), the court of appeals concluded that employment discrimination cases brought under the Constitution are governed by the "disproportionate impact" standard announced in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), for Title VII of the Civil Rights Act of 1964 (459 F.2d at 733). Subsequent decisions by this Court, however, have held that discriminatory intent is a necessary element of an employment discrimination claim brought under the Constitution (see *Washington* v. *Davis*, 426 U.S. 229 (1976)) and Section 1981 (*General Building Contractors Association* v. *Pennsylvania*, No. 81-280 (June 29, 1982)).

The petition for a writ of certiorari in No. 82-259 contends (at 41-42) that the original findings of constitutional violations in these cases are, therefore, infirm and that it was improper for the district court to rely "on those discredited legal conclusions to justify the 'modification' of the court's previous orders." Although the Police Department case was adjudicated in the district court before Title VII became applicable to state and municipal government employers in 1972, the district court in the Fire Department case appears to have held that the defendants' recruitment and certification practices violated Title VII (see page 6, *infra*). Accordingly, at least with respect to the Fire Depart-

remedial order requiring that black and Hispanic applicants be placed in a "priority pool" and be certified by the Civil Service Commission "according to some ratio, perhaps one from the priority pool to every one, two or three from the second pool * * *." *Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972) (footnote omitted). On remand, the district court approved and entered a consent decree providing for the creation of four groups of applicants, with certain black and Hispanic applicants being given a competitive advantage,[4] and affirmative recruitment of black and Hispanic applicants. *Castro* v. *Beecher*, 365 F. Supp. 655 (D. Mass. 1973).

In 1975, the parties, at the district court's urging (*Castro* v. *Beecher*, 386 F. Supp. 1281 (D. Mass. 1975)), entered into a substitute consent decree based on the decree entered in the Fire Department case (see page 6, *infra*). This decree required certification of police applicants in a manner designed to ensure the appointment by Boston and Springfield of one minority officer for each

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ment case, the district court was certainly entitled to proceed on the premise that the defendants had engaged in unlawful employment practices. With regard to the police case, petitioners should be estopped to challenge the liability judgment that was fully litigated between these same parties and finally adjudged against petitioners in 1972. At a minimum, they should have been required to seek in the district court in the first instance a modification of the prior order based on a change in the law. Certainly, it is too late to open the issue in this Court.

[4] Under the decree, minorities who had been rejected for employment as a result of the illegal tests and who passed the new valid tests were placed in an eligibility category known as group A. Persons who had actually passed the illegal tests were placed in group B. New minority applicants who passed the valid tests were placed in group C and other successful test takers were placed in group D. The decree provided that for each applicant in group B certified there had to be an applicant from group A, until it was exhausted. Then for each group B applicant certified, an applicant from group C would have to be certified until both B and C were exhausted. Only then could applicants from group D be certified. 365 F. Supp. at 661.

non-minority officer. The decree provided that the remedial measure would apply until the percentage of minority officers in the municipality's police force was commensurate with the percentage of minorities within the community, at which time further certifications would be made according to Massachusetts law (Pet. App. A5-A6).[5]

Pursuant to these decrees, between 1974 and 1980 the Police Department in Boston hired 492 police officers, of whom 213, or 43%, were minorities. The percentage of minorities in the Police Department increased from 2.3% in 1970 to 11.7% in 1981. During this period, the minority population of Boston also increased from approximately 23% to almost 30% (Pet. App. A10).

2. *The Fire Department Case*

This action was originally commenced in 1972 by the Boston Chapter of the NAACP and unsuccessful black and Hispanic applicants for appointment as firefighters in the City of Boston. Plaintiffs claimed racial discrimination in violation of the Fourteenth Amendment and 42 U.S.C. 1981 and 1983 in connection with the recruitment and certification practices established by the Massachusets Civil Service Commission and appointment practices of the City of Boston Fire Department. In 1975, the Attorney General of the United States brought an action raising similar claims, together with claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.* The two actions were consolidated.

Following hearings, the district court found that blacks represented approximately 16% of Boston's population and that the combined minority population was 23% of the total population. The court also found that blacks and Hispanics represented 0.9% of the Fire Department's sworn personnel. Concluding that the firefighters' entrance

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[5] "Pet. App." refers to the appendix to the petition in No. 82-185. "C.A. App." refers to the joint appendix filed by the parties with the court of appeals.

examinations administered from 1968 through August 1971 had an adverse racial impact on blacks and Hispanics and that the tests were not job-related, the court ruled that plaintiffs had established an unrebutted case of racial discrimination in the use of the firefighters' entrance examination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974). The district court ordered a program of active recruitment of minority firefighters, enjoined further certifications based upon the results of the discriminatory examinations and ordered development of a job-related examination. The order also provided for the creation of four groups of applicants (see note 4, *supra*) and the certification of black and Hispanic applicants on a priority basis until the fire department of the municipality achieved a percentage of minorities commensurate with the percentage of minorities within the community, at which time certifications were to be made in accordance with state law (371 F. Supp. at 521-523).

The court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975). The court apparently was of the view that the use of the firefighters' examination violated both Title VII and the Constitution. See 504 F.2d at 1021.

Between 1974 and 1980, pursuant to the court's decrees, the Fire Department hired 553 firefighters, of whom 248 (45%) were black or Hispanic. As of July 1981, of the 1,690 firefighters in the Department, 248 (14.7%) were black or Hispanic (Pet. App. A10).

3. *The Present Proceedings*

a. In the spring of 1981, the Boston Police and Fire Departments initiated a reduction-in-force program as a result of budgetary restrictions imposed by a voter-initiated tax limitation measure commonly known as "proposition 2½." The Departments proposed to make the layoffs pursuant to the Massachusetts civil service statute (Mass. Ann. Laws ch. 31, § 39 (Michie/Law.

Co-op. 1973)), which requires separation from service to be in reverse order of seniority (Pet. App. A2, A10-A11). The Police Department planned to lay off 252 officers of whom 122, or 48%, were black or Hispanic. At the conclusion of the planned layoffs, 103 of the remaining 1,660 officers would have been black or Hispanic, and minority representation in the Department would have decreased from 11.7% to 6.2% (*id.* at A10-A11). The Fire Department planned to lay off 207 officers, of whom 113 (54.6%) were black or Hispanic. Had the proposed layoff program taken place, 135 of the remaining 1,483 firefighters would have been black or Hispanic, and minority representation in the Department would have decreased from 14.7% to 9.1% (*id.* at A10-A11).

In April 1981, respondents moved pursuant to Fed. R. Civ. P. 60(b) for modification of the existing remedial decrees, which had not addressed the problem of layoffs, to prevent layoffs by reverse seniority.[6] Petitioners Boston Police Patrolmen's Association and Boston Firefighters Union were allowed to intervene as parties defendant (Pet. App. A6).

On August 7, 1981, the district court issued a single opinion for both cases (Pet. App. A31-A38). Finding that the scheduled reductions in force would significantly reduce minority representation in both the police department and the fire department, the court concluded that failure to amend the remedial decrees would frustrate "the objective thereof, namely bringing minority representation up to a level approximating [their] percentage of the total population" (*id.* at A37). Accordingly, the district court enjoined the Departments from laying off their employees in any manner that would reduce the

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[6] The United States filed a similar motion in the Fire Department case, but at the hearing, the government informed the district court that it was no longer seeking a ruling on its motion. The United States did not participate in the proceedings in the court of appeals.

percentage of minority officers and firefighters below their existing levels (*id.* at A38).[7]

b. The court of appeals affirmed (Pet. App. A1-A26). The court of appeals first held that the district court had authority to consider whether modifications of the existing consent decrees were warranted in light of the unforeseen layoffs (*id.* at A12-A16). Next, the court of appeals held that the district court's limited modification of the "last hired, first fired" requirement was proper in order "to preserve the integration already achieved" (*id.* at A20). Finally, the court of appeals held that the order giving some preference for minorities was not unconstitutional discrimination against the non-minority city employees (*id.* at A20-A26). The court reasoned that the existence of past discrimination created a compelling need to employ a race conscious remedy and thus the issue was only whether the particular order was reasonable (*id.* at A23). Stating that "the public interest requires a racially balanced police force" (*id.* at A22) and that "there is

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[7] According to petitioners, 258 Boston police officers and 257 firefighters were actually laid off as a result of proposition 2½. Of these, 34 officers (or 13%) (Pet. App. A23 n.14) and 38 firefighters (or 14.7%) (82-185 Pet. 7) were minorities. If the layoffs had been made by seniority, then 130 minority police officers and 164 minority firefighters would have been dismissed (*ibid.*). Correspondingly, under the district court's order 96 non-minority police officers and 126 non-minority firefighters, who would have been entitled to retain their jobs under the Massachusetts seniority statute, were laid off. At oral argument before the court of appeals, it was disclosed that no minority police officer with a seniority date before June 1980 was laid off, whereas non-minority officers with seniority dates as early as December 30, 1970, were dismissed. Part of this disparity was caused, however, by the absolute preference for veterans in the statutory layoff scheme. Mass. Ann. Laws ch. 30, § 9A (Michie/Law. Co-op. 1973).

The district court also enjoined the members of the Massachusetts Civil Service Commission "from disapproving, invalidating or interfering with the termination" of any firefighter who challenges his termination based on the district court's order (C.A. App. 155).

nothing magical about seniority" (*ibid.*), the court of appeals held that the "orders of the district court meet the test of reasonableness" (*id.* at A23).[8]

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[8] In June 1982, Massachusetts enacted legislation providing Boston with new revenues. The legislation required that Boston rehire all police officers and firefighters terminated since July 1, 1981; all personnel available for recall were reinstated by July 1, 1982 (82-185 Pet. 8). The legislation provides that the Boston police officers and firefighters terminated during the 1981 layoffs cannot be laid off again for fiscal reasons. 1982 Mass. Adv. Legis. Serv. ch. 190, § 25 (Law. Co-op.).

The recall of laid off police officers and firefighters does not appear to moot this case. The district court's orders *permanently* enjoin the Boston Police and Fire Departments from laying off police officers and firefighters in any manner that would reduce the percentages of minority officers below specified levels. Thus, the orders prohibit indefinitely application of the Massachusetts seniority statute to any future layoffs in these Departments. Accordingly, the State petitioners have a valid interest in setting aside the district court's permanent modification of the State's seniority system, as it pertains to layoffs in the Boston Police and Fire Departments. Cf. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

In addition, police officers and firefighters who were laid off as a result of the district court's orders have a particular interest in this Court's resolution of the case. Although insulated from future layoffs by the 1982 recall law, these police officers and firefighters have appeals pending before the Massachusetts Civil Service Commission seeking relief for violation of their seniority rights, including back pay and restoration of lost seniority (Pet. 8, 17). The district court has enjoined the Commission from "disapproving * * * the termination" of the incumbent employees, which could be interpreted as barring the Commission from granting any back pay. The Court's resolution of the issue presented in this case could thus be crucial to the disposition of those administrative appeals.

In these circumstances, it appears unlikely that "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). Rather, the controversy in this case appears still to be "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that in exercising the equitable authority granted in Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, courts are limited by the general policies and overall objectives of the Act. See, e.g., *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8. One policy of "overriding importance" in labor law generally (*Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964)), and of special significance under Title VII is the maintenance of seniority systems. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977); 42 U.S.C. 2000e-2(h).

Congress demonstrated particular concern in 1964 that the proposed Title VII might impair the legitimate interests of incumbent employees (see, e.g., 110 Cong. Rec. 486-489 (1964) (remarks of Sen. Hill)), and accordingly extended immunity under the statute to bona fide seniority systems. The extent to which that immunity confines the equitable discretion of district courts in remedying employment discrimination has been an issue before this Court before. Indeed, this Court decided almost the exact issue now before it in *Teamsters* v. *United States*, 431 U.S. 324 (1977), although the issue was posed in a slightly different context. In *Teamsters*, the Court built on its decision the prior Term in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), which held that constructive seniority was a proper remedy for identifiable victims of discrimination, because it equitably placed them in their rightful slot within the seniority system and did so without in any way modifying that system. In *Teamsters*, the Court was asked to decide which, if any, individuals who had failed to apply for particular employment should receive seniority relief. The Court drew the line of remedial discretion on the basis of which employees could show that they were entitled to a rightful place within the seniority system. Thus, all identifiable "victims" would be slotted above incumbent employees, but non-discriminatees were denied seniority relief.

The rule in *Teamsters* is a reflection of the relevant statutory policies that must inform the discretion of the district court in providing a remedy for a Title VII violation in hiring: actual victims must be "made whole," *Franks* v. *Bowman Transportation Co.*, *supra*, innocent incumbent employees have legitimate interests that limit the discretion of the equity court, *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and bona fide seniority systems should be allowed to remain intact, *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 10, 20-21. These policies of the Act are ignored by the order under review. This case involves nothing more than the situation facing those employees in *Teamsters* who could not make a showing that they were victims entitled to be slotted into the seniority system, but who nonetheless applied for a job and were hired. Time has passed and the financial condition of the employer has worsened. But the minorities involved are still non-victims of discrimination who can receive relief only at the expense of "bumping" incumbent white employees. See *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). Moreover, in order to grant this relief, the district court must substantially modify the seniority system as it applies to layoffs and thereby has undermined the State's statutory purpose in adopting the system. Accordingly, the reasoning and holding of *Teamsters* directly control this case and forbid the modification of the decree at issue here.

2. The district court's order, requiring non-victim minorities who are discharged because of seniority to be retained, is contrary to the last sentence of Section 706(g), 42 U.S.C. 2000e-5(g), which precludes a court from ordering reinstatement if the reason for an employee's release is something other than race or sex, etc. The last sentence in Section 706(g), which reflects the statutory intent to "make whole" victims of racial discrimination, permits employers to make employment decisions on any basis other than race and thus immunizes the decision of the City of Boston to lay off minority em-

ployees who are not victims of discrimination and who have less seniority.

3. By concluding that Title VII permitted the race conscious order at issue, the courts below have unnecessarily created a difficult constitutional issue under the equal protection component of the Due Process Clause of the Fifth Amendment. Assuming the courts below were correct and the order in this case is permissible under Title VII, then any challenge to that remedy necessarily raises issues regarding the scope of Congress' power under Section 5 of the Fourteenth Amendment to allow a court to provide for race conscious remedies. But such an issue would be appropriate for resolution only if there is clear evidence that Congress intended the courts to afford such relief. Not one word in the legislative history in either 1964 or 1972 suggests that it did. Accordingly, the Court should vacate the order as inconsistent with Title VII in order to avoid the constitutional issue that otherwise would exist. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

ARGUMENT

THE DISTRICT COURT'S ORDER EXCEEDED ITS REMEDIAL AUTHORITY UNDER TITLE VII.

Once it is adjudged that an employer has engaged in an unlawful employment practice within the meaning of Title VII, a district court is invested with authority to enjoin the employer from engaging in that practice in the future, and also is empowered to "order such affirmative action as may be appropriate, which may include * * * reinstatement, or hiring of employees, * * * or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Although the grant of equitable authority on its face is broad, it is necessarily constrained by the policies of the Act. As this Court reiterated just last Term, "when Congress invokes the Chancellor's conscience to further transcendent legisla-

tive purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Ford Motor Co.* v. *EEOC*, No. 81-300 (June 28, 1982), slip op. 7-8, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416-417 (1975). See also *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

A. The Order Of The District Court Disregards The Important Statutory Policy Embodied In Section 703(h), 42 U.S.C. 2000e-2(h), To Protect Seniority Systems, And Ignores The Legitimate Interests Of Incumbent Employees

Neither the district court nor the court of appeals engaged in anything like the searching examination of the relevant policies of the Act required by this Court's decisions. Indeed, the court of appeals disregarded both the history and purpose of Section 703(h), 42 U.S.C. 2000e-2(h), and the decisions of this Court when it failed to recognize, albeit in the context of its constitutional analysis (Pet. App. A23), that there is indeed something very important, if not "magical," about seniority systems in employment and the rights those systems allocate to employees that bear significantly on the propriety of a district court's exercise of equitable authority. See *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 13; *California Brewers Association* v. *Bryant*, 444 U.S. 598, 606-607 (1980); *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). This Court previously has pointed out that "seniority systems are afforded special treatment under Title VII itself." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1977). Section 703(h), by its terms, immunizes all bona fide seniority systems from challenge under Title VII, even sys-

tems that have a disproportionate adverse impact on minorities (*Teamsters* v. *United States*, *supra*), or operate to perpetuate past employment discrimination (*United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977)).[9]

Members of Congress in 1964 were very concerned about the seniority rights of employees. See H.R. Rep. No. 914, 88th Cong., 1st Sess. 71-72 (1963); 110 Cong. Rec. 486-487 (1964) (remarks of Sen. Hill). Accordingly, Senator Clark, one of the floor managers of the bill, submitted a Justice Department memorandum stating that the proposed Title VII would not affect existing seniority rights. 110 Cong. Rec. 7207 (1964); *id.* at 7212-7215. In addition, Senator Clark submitted another memorandum which included the following question and answer (110 Cong. Rec. 7216-7217 (1964)):

> What of dismissals? Normally labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?
>
> Seniority rights are in no way affected by this bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

During the Senate debates, Section 703(h) was included in the substitute bill that eventually was adopted. The provision was adopted to clarify the Act's "present intent and effect" with regard to seniority. 110

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[9] Section 703(h) of Title VII provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system * * * provided that such diffeerences [sic] are not the result of an intention to discriminate because of race * * *. 42 U.S.C. 2000e-2(h).

Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey); *id.* at 12818-12819 (remarks of Sen. Dirksen).[10]

While Section 703(h) does not "restrict relief otherwise appropriate once an illegal discriminatory practice * * * is proved" (*Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 762; *id.* at 791-792 (Powell, J., concurring in part and dissenting in part), the particular concern Congress expressed for the operation of a last hired, first fired rule and the special status that Congress has accorded to seniority systems in Title VII must be given dispositive weight by a court when crafting affirmative equitable relief for minority employees, such as those laid off in this case. 424 U.S. at 791-792. Cf. *American Tobacco Co.* v. *Patterson*, *supra*, slip op. 14.

Indeed, although this Court obviously has never dealt with this particular situation, its prior decisions dealing with comparable problems compel the conclusion that the relief granted in this case was impermissible. The first decision of this Court concerning the remedial authority of a court in the context of a seniority system was *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). *Franks* involved a claim of unlawful discrimination by a class of black nonemployee applicants who unsuccessfully sought employment as over-the-road truck drivers. The district court found that the employer had engaged in a pattern of racial discrimination in hiring, transfer, and discharge of employees. The district court ordered the employer to give priority consideration to class members for over-the-road jobs, but declined to award back pay or constructive seniority retroactive to the date of individual application. The court of appeals reversed the district court's ruling on back pay, but affirmed its refusal to award retroactive seniority.

This Court held that for actual victims of unlawful discrimination constructive seniority back to the date of the

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[10] Congress made no change in Section 703(h), when it revised Title VII in 1972. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 354 n.39.

discriminatory act was an appropriate remedy in order to restore those victims to their "rightful place," that is, "restored to a position where they would have been were it not for the unlawful discrimination." 424 U.S. at 764, quoting 118 Cong. Rec. 7168 (1972). See also *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421. But even in providing that actual victims must receive constructive seniority, this Court took pains to point out that "[n]o claim is asserted that nondiscriminatee employees holding OTR positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned." 424 U.S. at 776.[11]

Significantly, the constructive seniority rights awarded in *Franks* were not judicially invented rights, but only the rights defined by the existing seniority system itself, once the "rightful place" in that system of each identifiable victim of discrimination was determined.[12] The seniority rights of incumbent employees would also continue to be defined by that system, even though the "rightful place" in that system of some of those incumbents would be adjusted to accommodate the rights of individuals who would have been senior to them but for

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[11] Lower courts have expressly held that the relief for actual discriminatees does not extend to bumping employees previously occupying jobs; victims must wait for vacancies to occur. See, e.g., *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 267 (4th Cir. 1976); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969). This understanding of the limits of Section 706(g) with regard to actual victims may well have been ratified by Congress in 1972, since it was aware of the *United Papermakers* decision and nothing indicates that the amendment to Section 706(g) was an attempt to alter that interpretation. See Staff Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1844 (Comm. Print 1972).

[12] In the absence of a seniority system prescribed by contract or statute, incumbent employees would have no legally enforceable seniority rights, and there would be no occasion to award such rights to victims of discrimination (who would not have enjoyed any such rights had the discrimination not occurred).

the employer's unlawful discriminatory acts. See 424 U.S. at 774-779. Thus, the relief prescribed in *Franks* fundamentally preserves rather than abrogates rights under bona fide seniority systems, while extending those rights to identifiable victims of discrimination in order to make them whole.

A year later, the Court was faced with the need to further refine the relationship between seniority and the remedial authority of the district court under Title VII in *Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the defendant trucking company was found to have engaged in an unlawful pattern or practice of confining blacks and Hispanics to lower paying, less desirable jobs, and excluding them from positions as over-the-road truck drivers. The seniority system in the employer's collective-bargaining agreements provided that an incumbent employee who transferred to an over-the-road position was required to forfeit the competitive seniority he had accumulated in his previous position (company seniority) and to start at the bottom of the over-the-road drivers' seniority list. After affirming the district court's finding of liability under Title VII, the court of appeals held that all black and Hispanic incumbent employees—including those who had never applied for over-the-road positions—were entitled to bid for future over-the-road jobs on the basis of their accumulated company seniority. The appeals court further held that each class member filling such a job was entitled to an award of retroactive seniority on the over-the-road driver's seniority list dating back to the class member's "qualification date"—the date when (1) an over-the-road driver position was vacant and (2) the class member met or could have met the job's qualifications.

This Court first reversed the holding that the defendant's seniority system was itself subject to attack as perpetuating the past effects of discrimination. Although the system appeared to violate the rationale in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court held that Congress did not "outlaw the use of existing

seniority lists and thereby destroy or water down the vested seniority rights of employees * * *." 431 U.S. at 352-353. The Court then considered how to remedy the other discriminatory employment practices that had been proved. This Court rejected the defendant's argument that only individuals who had actually applied for OTR positions could obtain relief under Section 706(g). Instead, the Court held that relief in the form of constructive seniority was available to those who could satisfy their burden to prove that they were deterred from applying for that position because of the employer's discriminatory practices and that they were qualified for the job. 431 U.S. at 372. This latter class of plaintiffs, like those who were actually precluded from obtaining the OTR jobs, could show when they presumably would have been employed, but for the discrimination, and thus relief to them would not require modification of the seniority system itself, but merely "rightful place" fitting of individuals into that system. 431 U.S. at 358. As for those who could not make such a showing, the necessary implication is that they were not entitled to any relief in the form of constructive seniority.

In combination, *Franks* and *Teamsters* show that Title VII remedies must preserve the seniority rights protected generally in Section 703(h), and may modify those rights only to the extent necessary to place identifiable victims of discrimination in their rightful place in that system. This accommodation serves two very important concerns of equity jurisprudence under Title VII that were ignored by the courts below—the importance of maintaining the basic seniority system and the need to be fair to innocent incumbent employees. With regard to the latter concern, this Court noted in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978), "[t]he basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." See also *Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982). Accordingly, in crafting equitable relief under

Title VII, courts must consider the legitimate interests of "innocent third parties." *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 20.[13] Indeed, even in a case (unlike this one) in which specified victims of unlawful employment discrimination have been identified, a court, in determining their rightful place, is "faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters* v. *United States*, *supra*, 431 U.S. at 372.

In *Ford Motor Co.* v. *EEOC*, *supra*, this Court relied upon both the basic congressional intent to protect seniority and the importance of fairness to incumbent employees in deciding that an employer charged with hiring discrimination under Title VII can toll the continuing accrual of back pay liability under Section 706(g) by unconditionally offering the claimant the job allegedly denied him for impermissible reasons. The Court expressly rejected the argument that the employer must also offer seniority retroactive to the date of the alleged discrimination, for such a rule would "encourage[] job offers that compel *innocent workers* to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination." Slip op. 21; emphasis added. Foreseeing the possibility that layoffs could occur before the reinstated (or newly hired) claimant's Title VII suit was decided, the Court reasoned that (*ibid.*)

> an employer may have to furlough an innocent worker indefinitely while retaining a claimant who

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[13] In *Franks* the interests of the innocent employees obviously were affected by the constructive seniority remedy. But incumbents were afforded a substantial measure of protection by being allowed to remain in jobs, with accumulated seniority, that had been obtained in part because of discrimination by their employer. 424 U.S. at 774. In light of the advantage they had obtained from the prior discrimination, it was basically fair to slot victims into the seniority system and then allow the system to continue operating as the race-neutral basis for allocating future rights. *Id.* at 774-775.

> was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII * * * require innocent employees to carry such a heavy burden.

What emerges from this Court's decisions is the firm rule that a district court in a Title VII case may not modify a bona fide seniority system; it can only slot individuals into their rightful place within that system—and individuals, such as those involved in this case, who are only beneficiaries of affirmative action and not victims of discrimination entitled to rightful place relief, have no basis for claiming any seniority in addition to what they have actually accrued on the job.[14] Thus, when the initial hiring order was issued in 1975, the district court would have been wholly without any authority either to slot new applicants in place of incumbents (see note 11, *supra*) or even to award them constructive seniority when hired. The district court's order insulating a certain percentage of minority employees from dismissal under the statutory seniority system was, however, tantamount to an award of constructive seniority that placed its beneficiaries in a position superior to that of incumbent non-minority employees.[15] Since the order concededly embraced persons

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[14] Under *Teamsters*, of course, the district court in this case should have determined who among incumbent black and Hispanic police officers and firefighters had been actual victims of the defendant's original hiring discrimination and adjusted the competitive seniority of those victims. See *Chance* v. *Board of Examiners*, 534 F.2d 993, 999, 1007 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977). Layoffs then would proceed in order of reverse seniority, as prescribed by state law. Given the four classes of priority hiring, it is not clear whether any actual victims would have been laid off even without some constructive seniority (see note 4, *supra*).

[15] It is of no significance that the award of constructive seniority here was only for the limited purpose of determining who would

who were not victims of the defendants' unlawful employment discrimination, the district court's award of retroactive seniority was indistinguishable—save in its timing—from the award condemned in *Teamsters*.[16]

In the instant case, innocent firefighters and police officers were required to sacrifice not only their seniority, but also their jobs to persons who have never claimed to be victims of unlawful discrimination. As a result of the district court's decree, white firefighters and police officers—some with more than ten years of service—were furloughed, while black and Hispanic employees with as little as two years' seniority were retained.[17] This was

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be laid off. Under the State's presumptively bona fide seniority system, that important question was to be determined on the basis of seniority.

[16] The central flaw in the court of appeals' logic is its assertion that allowing layoffs to be based on seniority somehow makes "a mockery of the equitable relief already granted" (Pet. App. A19). But there has been no new violation of the Act that would require a modification of the decree and accordingly the issue is simply whether the district court could have modified the seniority system when it initially entered its order in 1975. The layoffs, which are a product of an unforeseeable modification in the City's budget, do not significantly undermine the prior order. If the City of Boston had been faced with this budgetary crisis in 1975, when the original affirmative action order was imposed, no one would have suggested that the remedial order was undermined by the temporary failure of the City to integrate its work force. Certainly, the district court would have lacked authority either to order the City to hire additional employees or to require the City to bump incumbent white employees to make room for minority hires. See cases cited note 11, *supra*. The order in this case does no more than retroactively accomplish what the court could not have done directly in 1975 if the economic problems had existed then. It required the City either to bump incumbent whites or do what the State eventually provided for, hire more people. This result is directly contrary to this Court's admonition that equity under Title VII should not permit " 'different results for breaches of duty in situations that cannot be differentiated in policy.' " *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8 (citation omitted).

[17] Unlike the voluntary craft training program in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the court's layoff order re-

not a permissible exercise of remedial authority under Title VII. That remedial authority is limited to the effectuation of the policies of the Act: one of the Act's firmly established policies is the preservation of bona fide seniority systems. There is no suggestion of any discriminatory purpose underlying the seniority system in this case and accordingly the district court was without authority to reconstruct it.

B. An Additional Indication That Congress Did Not Intend To Grant Constructive Seniority In The Circumstances Of This Case Is The Limitation On Remedial Authority Contained In The Last Sentence of Section 706(g)

Our argument that the policies of Title VII make plain that seniority systems ought not to be modified to grant the beneficiaries of affirmative action additional protection from layoffs is reinforced by the limitation in the last sentence of Section 706(g). That sentence reads in pertinent part:

> No order of the court shall require the * * * reinstatement of an individual as * * * an employee * * * if such individual * * * was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.[18]

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quired discharge of senior white employees, solely in order to maintain existing racial percentages. Even in interpreting Title VII's prohibitions in a context not involving state action, *Weber* disapproved actions which "unnecessarily trammel the interests of the white employees." 443 U.S. at 208. In contrast to this case, two of the critical facts leading to the conclusion that the training program in *Weber* did not violate Title VII were that the program did not require the discharge of white workers and their replacement with new black hires and was not intended to maintain racial balance.

[18] In an interpretative memorandum—characterized by this Court as one of the "authoritative indicators" of the meaning of Title

The district court's order in this case is contrary to both the language and spirit of this provision.

The court basically has ordered specific minority employees scheduled for layoffs to be reinstated. But those employees were laid off on the basis of a bona fide seniority system. Such layoffs constitute employment action for a reason unrelated to race and are otherwise perfectly legal. See, e.g., *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, 508 F.2d 687 (3d Cir. 1975), cert. denied, 425 U.S. 998 (1976); *Watkins* v. *Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). Accordingly, Section 706(g) by its terms precludes the kind of individual redress granted to these minority employees who have suffered no discrimination.

This conclusion is also required by the remedial purposes of Title VII embodied in Section 706(g). As this Court has recognized, "[t]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977). The central remedial purposes of Title VII are, as this Court has often observed, "to end discrimination * * * [and] to compensate the victims for their injuries." *Ford Motor Co.* v. *EEOC*, *supra*, slip op.

VII (*American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 10)—Senators Clark and Case, the bipartisan "captains" responsible for explaining and defending Title VII in the Senate debate, explained the provision's intended effect: "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin." 110 Cong. Rec. 7214 (1964). See also statements by Senators Humphrey and Kuchel. *Id.* at 6549, 6563.

11; see, e.g., *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. In this latter connection, "the purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Section 706(g) thus requires a court "to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (footnote omitted);[19] accord, *Teamsters* v. *United States*, *supra*, 431 U.S. at 364.

Since the remedial authority of courts under Section 706(g) is limited by the provision's very terms to effectuating the Act's overriding purposes of bringing discrimination to an end and compensating victims for their injuries, the district court lacked authority to enter the modification of the remedial order in this case. The persons who benefitted from the district court's reconstructed seniority system were not victims of discrimination, and the grant of constructive seniority to them distorts the statutory purpose. It also brings into being a new class of victims, completely innocent of any wrongdoing, by depriving them of their rights under a valid seniority system (see pages 18-20, *supra*).

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[19] In *Franks* the Court thoroughly canvassed Title VII's legislative history, relying particularly on the 1972 amendments to Section 706(g). The section-by-section analysis accompanying the Conference Committee Report on the 1972 amendments emphatically confirms the "make whole" purpose of Title VII: "[T]he scope of relief under that section of the Act is *intended to make the victims of unlawful discrimination whole*, * * * restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972) (emphasis added), quoted in *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764, and *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421. Moreover, "[t]he Reports of both Houses of Congress indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 764 n.21.

C. The Courts Below Should Have Avoided Creating A Substantial Constitutional Question By Refraining From Issuing A Race Conscious Seniority Order That Was Not Clearly Intended By Congress In Title VII

After the court of appeals held that the district court's order was permissible under Title VII, it necessarily addressed the constitutionality of the race conscious order under the equal protection component of the Due Process Clause of the Fifth Amendment.[20] The sole purpose of the layoff order, as the court of appeals candidly asserted, was to prevent any reduction in the percentage of minority employees in the Boston Police and Fire Departments—"to maintain some semblance of racial balance" in the police and firefighter forces (Pet. App. A22). Obviously, such an order classifies on the basis of race (indeed, disadvantages some persons because of their race) and thereby implicates a serious equal protection concern.

Whether Congress could provide under Section 5 of the Fourteenth Amendment that race conscious modifications of a seniority system to remedy past discrimination are permissible in order to maintain an integrated work place and, if so, what types of modifications it could approve are novel issues that have never been decided by this Court. Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980). But they are questions that should be addressed only when it is fairly clear that Congress intended to authorize such relief and thereby force the Court to evaluate Congress' power to act through the courts on a race conscious basis.[21] This is particularly so in a Title VII case, where

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[20] Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976). It is well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See *Ex parte Virginia*, 100 U.S. 339 (1879).

[21] Another possibility, not presented here, would be a requirement that other race-neutral indicia of merit, in addition to senior-

the district court's equitable authority is carefully delimited by Congress' intent and the purposes of the Act. See *Ford Motor Co.* v. *EEOC*, *supra*, slip op. 8; *Teamsters* v. *United States*, *supra*, 431 U.S. at 364; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 416-417. Thus, if the Act does not support the order of the court, there is no residual equitable discretion.

Regardless of what can be gleaned from the legislative history of Title VII with regard to its general policies, there is not a shred of evidence that Congress either in 1964 or 1972 intended to authorize a district court to modify a last-hired, first-fired rule in order to maintain racial balance.[22] Moreover, no court had ever considered the issue prior to 1972. In the absence of clear evidence of at least arguable congressional intent to allow a district court to take into account such societal concerns as a basis for disadvantaging one group over another with regard to seniority, the courts below should have declined to interpret Title VII to authorize the order adopted in this case and thereby avoided any need to confront the difficult con-

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ity, be utilized in determining which employees to lay off, in the hope of preserving more of the results of the consent decree. It might well be within the constitutional power of Congress to impose such a requirement, but, for reasons previously stated, it is doubtful that judicial modification of the seniority system in that way would be consistent with the remedial policies of Title VII.

[22] The court of appeals opined that racial balance in public safety departments is necessary to avoid "antagonism, hostility and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most." Pet. App. A24-A25. If such concerns had led state or local authorities to adopt a race conscious hiring or layoff plan because of operational needs in enhancing the community's police or fire protection, a substantial constitutional question would be presented. *Cf. Morton* v. *Mancari*, 417 U.S. 533 (1974). But the state-required seniority system precluded the assertion here by city or state authorities of any such operational needs, and it was improper in these circumstances for the courts below to hypothesize such operational needs and thereby impinge upon constitutionally protected interests of individuals in the absence of a claim by the state of a need to do so.

stitutional issue created by such an order. See *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 8; *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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